

Jordan



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Delta Ventures

File: B-238655

Date: June 25, 1990

William L. Smith, for the protester.

S. J. Evans, National Aeronautics and Space Administration, for the agency.

Paul E. Jordan, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests of failure to set aside procurement for small businesses and omission of bond requirements are untimely when not raised prior to the closing date for receipt of proposals.
2. Where an agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for a decision by the General Accounting Office (GAO) on bid protest, and notifies GAO prior to making award, the agency has complied with the Competition in Contracting Act of 1984. GAO does not review the agency's determination.
3. Composition of source evaluation board is within the discretion of the agency, and where protester has not shown fraud, bad faith, conflict of interest, or actual bias, there is no basis to question composition of the panel.
4. Speculative allegations regarding rationale behind competitive range decision, unauthorized discussions between the agency and other offerors, and a conflict of interest of an offeror other than the awardee, are insufficient to form the basis of a protest.
5. Proposal was properly rejected from the competitive range where the agency reasonably concluded that the offeror had no reasonable chance of award because of deficiencies in areas of mission suitability, a poor rating for relevant experience and past performance, and its low proposed cost

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was found insufficient to overcome the deficiencies in its proposal.

DECISION

Delta Ventures protests its elimination from the competitive range under request for proposals (RFP) No. 9-BG-34-10-9-34P, issued by the Lyndon B. Johnson Space Flight Center, National Aeronautics and Space Administration (NASA), for construction services. Among other grounds, Delta contends that the evaluation of its proposal was inaccurate and that the deficiencies identified by NASA were insufficient to exclude it from the competitive range.

We deny the protest in part and dismiss it in part.

The services sought by the RFP included the management, planning, and execution of a broad variety of construction tasks with regard to alteration to the existing physical plant at the Johnson Space Flight Center. The contract for such services would encompass the alteration of laboratory systems, facilities or utilities, and roads, sewers, walks, and other site work, on a cost-plus-award-fee, level of effort basis for 1 year, with four 1-year options.

Six offerors, including Delta, submitted proposals by the closing date of September 25, 1989. The proposals were evaluated by a source evaluation board (SEB) in the areas of "Mission Suitability," "Cost," "Relevant Experience and Past Performance," and "Other Considerations." Only the Mission Suitability factor was numerically scored and it included the following subfactors: "Management" (150 points), "Key Personnel" (300 points), and "Understanding the Requirement" (550 points), for a total of 1,000 points. The RFP identified "Mission Suitability" and "Cost" as most important and of equal importance. "Relevant Experience and Past Performance" were of less importance, while "Other Considerations" were of least importance.

Major weaknesses were identified in Delta's proposal under each evaluation factor and the proposal was rated "fair" overall. The SEB determined that Delta's probable cost (\$28,386,000), though competitive, was not sufficiently low to offset Delta's low evaluation. The contracting officer determined to eliminate Delta, the fifth ranked offeror, and one other offeror from the competitive range as having no reasonable chance for award. Delta was notified of its elimination by letter dated November 22.

After discussions were conducted with the remaining four offerors, each submitted a best and final offer. Based upon

the final evaluation of technical proposals and most probable cost, Fluor Daniel Services, Inc. was selected for final award negotiations in January 1990. Fluor had a score of 929 points with an evaluated probable cost of \$28,222,000. Delta was debriefed on February 9, 1990, and then filed its protest with our Office. Subsequently, NASA determined that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision, and it awarded the contract to Fluor.

Delta raises a number of protest grounds, most of which are without merit or otherwise not for review by our Office. Delta first argues that the procurement should have been set aside for small businesses and that the solicitation improperly failed to include a requirement for bid and performance bonds. Both of these matters were apparent from the face of the RFP and under our Bid Protest Regulations, protests based on such apparent improprieties must be filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1990). Since Delta failed to raise these issues in a timely manner, we dismiss them.

Delta next objects to the agency's determination to award the contract prior to our resolution of the protest. Under the Competition in Contracting Act of 1984 (CICA), an agency must withhold award of a contract when it receives notice of a protest from this Office prior to award. 31 U.S.C. § 3553(d)(1) (1988). However, upon a written finding, and notice to our Office, that urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for our decision on the protest, an agency may award the contract while the protest is pending. 31 U.S.C. § 3553(c)(2)(A) and (B). Here, the agency made such a finding and properly notified our Office. We do not review an agency's determination of that finding. The Taylor Group, B-234294, May 9, 1989, 89-1 CPD ¶ 436.

Delta next challenges the qualifications of the SEB members, claiming generally that they do not possess sufficient knowledge of construction matters to make a proper evaluation. The agency reports that panel members had adequate expertise to evaluate proposals for construction services, and that this expertise included the areas of contracting and civil engineering. In any event, the composition of a source evaluation board is within the discretion of the contracting agency, and since the protester has not shown fraud, bad faith, conflict of interest, or actual bias, we have no reason to question the composition of the board.

See Johns Hopkins Univ., B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240.

Delta also alleges that one offeror may have been kept in the competitive range because it was a large business even though its proposal indicated a lack of understanding of the work; that Delta was eliminated from the competitive range to prevent the source selection official from considering its proposal; that it would be improper if other offerors were afforded visits to the agency when such visits were denied to Delta; and that one of the other offerors, which did not receive the award, possibly had an organizational conflict of interest. The agency denies the allegations. We find that Delta's allegations, unaccompanied by any convincing evidence, amount to mere speculation, which is insufficient alone to provide the basis for sustaining a protest. Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275.

The protester's remaining issue concerns whether its proposal was properly evaluated and eliminated from the competitive range. The evaluation of technical proposals and the resulting determination as to whether an offer is in the competitive range is a matter within the discretion of the contracting agency, since that agency is responsible for defining its needs and the best method of accommodating them. Information Sys. & Networks Corp., B-237687, Feb. 22, 1990, 90-1 CPD ¶ 203. In reviewing an agency's technical evaluation, we will not reevaluate the proposal, but instead will examine the agency's evaluation to ensure that it was not arbitrary or in violation of the procurement laws and regulations. Id. A protester's disagreement with the agency's judgment is not sufficient to establish that the agency acted arbitrarily. United HealthServ Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

According to the RFP, the proposals were required to demonstrate the offerors' competence to successfully complete the specified requirements. In this regard, the SEB evaluated Delta's proposal as "fair" overall, with a score of 451 out of 1,000 possible points for "Mission Suitability," a "poor" rating for "Relevant Experience and Past Performance," and, under "Other Considerations," ratings of "fair" on its phase-in plan, "unsatisfactory" on its financial condition and capability, and "satisfactory" on labor relations, acceptance of contract provisions, and priced options. In its protest, Delta discusses each identified weakness and argues generally that the weaknesses identified at its debriefing were insufficient to eliminate

it from the competitive range.^{1/} More specifically, Delta contends that its low scores were undeserved because the evaluators failed to understand its proposal which addressed all the RFP's requirements.

We have reviewed Delta's numerous arguments, its proposal, the evaluators' work sheets, the source selection evaluation reports, and the agency's rebuttal to Delta's arguments, and find no basis for concluding that the evaluation was unreasonable or not in accordance with the stated evaluation criteria. For example, under the subfactor of "Understanding the Requirement," offerors were evaluated on their detailed responses to five technical problems representing some of the types of work the successful offeror would encounter: procurement and installation of a 750 kilovolt transformer; repair of a tunnel leak adjacent to mission critical computer cables; installation of a new heating/ventilation/air conditioning mixing box; relocation of a thermostat; and procurement and installation of an air handler covered by a manufacturer's warranty. The problem solving was worth 200 of the 550 "Understanding" subfactor points and Delta received 72 points for its proposed solutions. Although Delta apparently successfully solved the transformer problem, the evaluators found, among other weaknesses, that Delta failed to provide for the immediate protection of computer cables in the tunnel leak problem; failed to address installation, testing, computer protection, and balancing of the system on the mixing box installation problem; merely suggested referring the thermostat relocation problem to the maintenance and operations contractor; and failed to account for maintenance of warranty information, to ensure that warranted repairs could be claimed on the air handler. In response, Delta generally disagrees with the evaluators' judgment in evaluating its problem solutions. From our review of the record, we find the evaluators had a reasonable basis to give Delta a low score for this subfactor.

On another evaluation factor, "Relevant Experience and Past Performance," Delta received a "poor" score. The same information also resulted in a score of 54 of 175 points for Delta's project manager, under the "Key Personnel" subfactor. The low scores were based on the SEB's finding that Delta's past experience was based on small commercial

^{1/} To the extent Delta is arguing that its debriefing was inadequate, the adequacy of a debriefing is a procedural matter which has no effect on the evaluation of proposals or the award to Fluor. See Senior Communications Servs., B-233173, Jan. 13, 1989, 89-1 CPD ¶ 37.

contracting, different in scope and complexity from the NASA requirement which involves management of numerous small-dollar work requests. The scores also were based on unfavorable reference checks: one former customer was dissatisfied with Delta's performance because of cost overruns and because Delta's decisions and advice regarding painting and insulation were deficient. Another reference, a "major aerospace contractor," stated that Delta had been disqualified from bidding on its construction jobs.

In response, Delta complains that the SEB misinterpreted its prior experience on larger jobs by erroneously concluding that Delta was a subcontractor when in fact it was the prime contractor. Regarding the poor references, Delta notes that the first reference had not paid Delta and that any other deficiencies noted were probably due to underfunding or a client trying to save money by cutting corners.

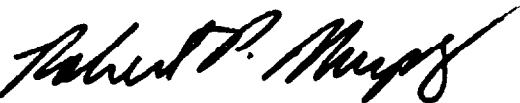
From our review of Delta's proposal and the evaluators' work sheets, we find the evaluations reasonable. Further, to the extent there may have been a misinterpretation of Delta's past experience as a subcontractor, rather than prime contractor, the agency explains that none of the larger dollar value contract experience of Delta appears comparable to the solicited construction services and an increase in the adjective rating or the Key Personnel score would not have changed Delta's standing. Under these circumstances, we find that Delta did not suffer any prejudice from the possible misinterpretation. See Kunkel-Wiese, Inc., B-233133, Jan. 31, 1989, 89-1 CPD ¶ 98.

We conclude that the contracting officer reasonably excluded Delta from the competitive range. The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the agency will hold written or oral discussions. Federal Acquisition Regulation § 15.609(a) (FAC 84-16). The competitive range consists of all proposals that have a "reasonable chance" of being selected for award, that is, it includes those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. Information Sys. & Networks Corp., B-237687, supra. In determining the competitive range, it is an acceptable practice to compare the evaluation scores and consider an offeror's relative standing among its competitors, and to exclude a proposal that is technically acceptable or capable of being made so when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award. See Information Sys. & Networks, B-227687, supra; Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114.

Here, Delta's "Mission Suitability" score of 451, coupled with its "poor" past performance placed it significantly below the fourth ranked offeror which was included in the competitive range and 478 points below the awardee. We agree with the agency's determination that for this cost reimbursement contract, Delta's low proposed cost was outweighed by Delta's low technical evaluation. See Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273. Moreover, in fact, Delta's probable cost was evaluated as exceeding Fluor's probable cost by \$164,000. Thus, the agency reasonably eliminated Delta from the competitive range without conducting discussions.

Finally, Delta contends that Fluor cannot perform the contract successfully at fair and reasonable prices since it has proposed to accomplish the cyclic work by using a "mythical and non-existent labor pool." Whether Fluor is capable of performing the contract concerns the agency's affirmative determination of responsibility, which we will not review unless there is a showing of fraud or bad faith on the agency's part or that definitive responsibility criteria in the RFP were not met. Electronic Sys. USA, Inc., B-233104, Dec. 28, 1988, 88-2 CPD ¶ 631. Delta has failed to make the requisite showing.

Accordingly, the protest is denied in part and dismissed in part.



for James F. Hinchman
General Counsel